

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION**

<b>ROBERT CLYDE MCMILLEN,</b>	)	
<b>ID # 1822252,</b>	)	
<b>Petitioner,</b>	)	
<b>vs.</b>	)	<b>No. 3:13-CV-1912-P (BH)</b>
	)	
<b>RICK THALER, Director,</b>	)	<b>Referred to U.S. Magistrate Judge</b>
<b>Texas Department of Criminal</b>	)	
<b>Justice, Correctional Institutions Division,</b>	)	
<b>Respondent.</b>	)	

**FINDINGS, CONCLUSIONS, AND RECOMMENDATION**

Pursuant to *Special Order 3-251*, this case has been automatically referred for findings, conclusions, and recommendation. Based on the relevant findings and applicable law, the habeas corpus petition should be **DISMISSED** without prejudice for failure to exhaust state court remedies.

**I. BACKGROUND**

Petitioner, an inmate currently incarcerated in the Texas Department of Criminal Justice - Correctional Institutions Division (TDCJ-CID), filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 on May 20, 2013. The respondent is Rick Thaler, Director of TDCJ-CID.

On November 21, 2012, petitioner pled guilty to theft in Cause No. F12-59889 and was sentenced to 10 months of imprisonment. *See* Petition (Pet.) at 2. He filed a notice of appeal in the trial court on January 11, 2013, that was later transferred to the Fifth District Court of Appeals. The State filed a motion to dismiss the appeal for lack of jurisdiction on May 14, 2013, but it remains pending. (*See* Pet. at 3; [www.search.tx.courts.gov](http://www.search.tx.courts.gov), Cause No. 05-13-00099).<sup>1</sup> He has not yet filed a state writ in the trial court. (*See* [www.dallascounty.org](http://www.dallascounty.org), search for petitioner).

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<sup>1</sup> Petitioner characterizes this appeal as a post-conviction writ of habeas corpus in the trial court, but it is actually a direct appeal. He has also filed a motion for leave to file a writ of mandamus with the Court of Criminal Appeals, which was denied on May 1, 2013. *See Ex parte McMillen*, WR-79,255-01 (Tex. Crim. App. May 1, 2013).

In his federal petition, petitioner asserts that his due process rights were violated and that his attorney provided ineffective assistance of counsel. (Pet. at 6-7).

## **II. EXHAUSTION**

A petitioner must fully exhaust state remedies before seeking federal habeas relief. 28 U.S.C. § 2254(b). To exhaust in accordance with § 2254, a petitioner must fairly present the factual and legal basis of any claim to the highest available state court for review prior to raising it in federal court. *See Deters v. Collins*, 985 F.2d 789, 795 (5th Cir. 1993); *Richardson v. Procnier*, 762 F.2d 429, 432 (5th Cir. 1985); *Carter v. Estelle*, 677 F.2d 427, 443 (5th Cir. 1982). In Texas, a prisoner must present his claim to the Texas Court of Criminal Appeals in a petition for discretionary review (PDR) or an application for writ of habeas corpus. *See Bautista v. McCotter*, 793 F.2d 109, 110 (5th Cir. 1986); *Richardson*, 762 F.2d at 432. To exhaust in accordance with § 2254, a petitioner must fairly present all claims to the state courts prior to raising them in federal court. *Deters v. Collins*, 985 F.2d 789, 795 (5th Cir. 1993).

A federal district court may raise the lack of exhaustion *sua sponte*. *Shute v. State*, 117 F.3d 233, 237 (5th Cir. 1997). It is well-settled that federal courts can dismiss without prejudice a federal petition for writ of habeas corpus that contains unexhausted grounds for relief. *See Rose v. Lundy*, 455 U.S. 509, 510 (1982). As a matter of comity, the state courts must be given a fair opportunity to hear and consider the claims raised by an applicant before those claims are heard in federal court. *Picard v. Connor*, 404 U.S. 270, 275 (1971).

Here, petitioner has not fairly presented the claims he raises in his federal petition to the Court of Criminal Appeals either by way of a PDR or a state writ. While he has appealed his conviction, that appeal remains pending in the state appellate court. The Court of Criminal Appeals

has not had an opportunity to review the claims raised in his federal petition. A ruling from the federal court at this juncture would preempt the state court from performing its proper function. *See Rose*, 455 U.S. at 518 (the exhaustion requirement is “designed to protect the state courts’ role in the enforcement of federal law and prevent the disruption of state judicial proceedings”). Petitioner is therefore not entitled to habeas corpus relief for failure to exhaust his state remedies.

### **III. RECOMMENDATION**

The habeas corpus petition should be **DISMISSED** without prejudice for failure to exhaust state court remedies.

**SIGNED this 22nd day of May, 2013.**

  
IRMA CARRILLO RAMIREZ  
UNITED STATES MAGISTRATE JUDGE

### **INSTRUCTIONS FOR SERVICE AND NOTICE OF RIGHT TO APPEAL/OBJECT**

A copy of these findings, conclusions and recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of these findings, conclusions and recommendation must file specific written objections within fourteen days after being served with a copy. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge’s findings, conclusions and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. *See Douglass v. United Servs. Automobile Ass’n*, 79 F.3d 1415, 1417 (5th Cir. 1996).

  
IRMA CARRILLO RAMIREZ  
UNITED STATES MAGISTRATE JUDGE